INTERIOR BOARD OF INDIAN APPEALS

Stephen Aghjayan v. Acting Portland Area Director, Bureau of Indian Affairs

29 IBIA 128 (03/20/1996)

Reconsideration denied:
29 IBIA 174

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

STEPHEN AGHJAYAN
v.
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-105-A Decided March 20, 1996

Appeal from the cancellation of a lease of Indian land.

Affirmed.

1. Indians: Leases and Permits: Generally

In managing leases of Indian trust or restricted land, the Bureau of Indian Affairs acts as trustee for the Indian landowners, not the lessee. The Bureau has no duty to protect a lessee against his own negligence.

APPEARANCES: Robert F. Baker, Esq., and Grant Kinnear, Esq., Seattle, Washington, for appellant; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE

Appellant Stephen Aghjayan seeks review of a March 20, 1995, decision of the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the cancellation of his lease of allotted land on the Swinomish Reservation for failure to pay interest on late-paid rent and failure to post a surety bond. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant was lessee under Lease 8118-90-15, which was approved by the Superintendent, Puget Sound Agency, BIA, on April 9, 1990. The lease covered Lot 5 of the Capet Zalsiluce Waterfront Tracts. It was for homesite and recreation purposes and had a term beginning February 1, 1990, and ending January 31, 2015. The initial rental was $1,150 per year. Rental payments were due "2/1/90 and upon each successive anniversary date thereof for the term of the lease." Lease Provision 5 stated that it was "understood and agreed between the parties hereto, that, if any installment of rental is not paid within 30 days after becoming due, interest at the rate of 18 percent per annum will become due and payable from the date such rental became due and will run until said rental is paid."

The lease also provided that it was entered into "in accordance with the provisions of existing law and the regulations (25 CFR 162) which by reference are made a part hereof." 25 CFR 162.5(c) requires the posting of a surety bond.

Appellant posted a surety bond when he entered into his lease. However, that bond expired on February 20, 1993.

In 1991, appellant was five months late in making his rental payment. When he made the payment in July 1991, he was required to, and did, pay $86.11 in interest. In 1992 and 1993, appellant did not make any rental payments.

On February 28, 1994, the Agency issued a bill for collection in the amount of $2,921.52 covering the overdue rent for 1992 and 1993 plus interest. In a March 3, 1994, letter to appellant, the Superintendent
stated:

> You now owe interest in the amount of $428.31 for 92-93 and $226.07 for 93-94. This is in addition to your rent. Please make payment in the amount of $2921.52 payable to the Bureau of Indian Affairs immediately to prevent additional interest and possible cancellation of your lease for non-payment of rent.
>
> You also need to post a new bond in the amount of $1150.00. Your bond was cancelled by your bonding company for failure to make payment of premium.
>
> This is your notice that you have 10 days from receipt of this letter to show cause why this lease should not be cancelled for non-payment and failure to post an adequate bond for the lease.

On March 9, 1994, appellant wrote to the Agency, stating:

> This letter is in response to your letter to me dated March 3, 1994, regarding your Bill for Collection for rent due on lot 5 Capet Zalsiluce.
>
> In March of 1992 I called [an Agency employee] at your office and asked that I be sent a bill for my 1992-1993 rent. The prior year I had been sent a bill and had paid it. I was told at that time that the B.I.A. would not be handling the leasing affairs of the Capet Zalsiluce tracts any longer and I should be hearing from a lawyer representing the land owners. No such communication was ever forthcoming, nor did I ever receive any billing from your office for 1992-1993 and again for 1993-1994.
>
> I am sending payment for all rent due. I am not sending payment for interest. Due to the information given to me and the lack of any previous billing from your office, I do not feel responsible for the delayed payments.

On March 30, 1994, the Superintendent wrote to appellant, stating:

> You have made a partial payment of the rent. You have a balance of $654.38. This amount is due immediately.
>
> Your lease contract states Date Due "2/1/90 and upon each successive anniversary date thereof [for] the term of the lease." You are responsible for making your lease payments on February 1st of each year regardless of whether or not you receive a Bill for Collection.
>
> **You have 10 days from date of receipt of this notice to pay the $654.38 balance on your rent or show cause why your lease should not be cancelled for non-payment of the balance of your rent**. [Emphasis in original.

Appellant received this letter on March 31, 1994, as shown by his signature on the return receipt for certified mail. Although the record does not reflect any contact between appellant and the Agency immediately after March 31, 1994, appellant states that he had telephone conversations with Agency personnel, during which he apparently contended that he should not have to pay interest at all or at least should not have to pay it at the rate of 18 percent. See Appellant's Opening Brief at 3, 5.

At about this time, the Swinomish Tribe (Tribe) assumed responsibility for realty functions on its reservation under a Self-Governance compact. On May 2, 1994, the Tribal Natural Resources manager (manager) wrote to appellant about his expired surety bond, stating that appellant must either execute an assignment of savings account or acquire a new bond. On May 27, 1994, the Manager again wrote to appellant, reminding him that his lease was subject to cancellation unless he paid $654.38 in interest and either executed an assignment of savings account or renewed his surety bond.

In a May 31, 1994, letter to the Manager, appellant stated that he was in the process of obtaining a bond but still objected to payment of $654.38 in interest. By letter of June 1, 1994, the Manager informed appellant that, if payment of the interest was not received in the Tribal Realty Office by June 10, 1994, he would recommend to BIA that the lease be cancelled. Appellant telephoned the Manager when he received the June 1 letter. He did not agree to pay the full amount of the interest assessed but evidently stated that he would be willing to pay 5 to 7 percent interest. 1/ On June 13, 1994, the manager wrote to appellant, stating:

1/ In his opening brief in this appeal, appellant states:

"[Appellant] called [the Manager] and explained his thinking on the issue. In essence, while [appellant] believed he should not have to pay any interest, in thinking it over, he acknowledged that he should have to pay some interest because he had use of the money during the relevant time period. However, he still felt that 18% percent was too high, and that the interest should be an the range charged by banks during that time period,

"In our conversation you indicated an unwillingness to pay the full amount of late charges. I therefore have no choice but to request the BIA to cancel your lease."

On June 15, 1994, the Superintendent issued a notice of cancellation of the lease for non-payment of the interest. On the same day, appellant mailed a check for $654.38 to the Agency. The check was received at the Agency on June 16, 1994, together with a handwritten note from appellant, stating that he was paying the interest under protest. It appears that the Superintendent's cancellation notice and appellant's check crossed in the mail.

The Superintendent sent a second cancellation notice on June 30, 1994, based upon appellant's failure to post a bond in the amount of $1,150.

In August 1994, appellant obtained a bond.

Appellant appealed the June 15 and June 30, 1994, notices of cancellation to the Area Director. On March 20, 1995, the Area Director affirmed both notices.

Appellant then filed a notice of appeal with the Board. Both appellant and the Area Director filed briefs.

Discussion and Conclusions

Appellant challenges the Area Director's decision with respect to both notices of cancellation. As to the June 15, 1994, notice concerning non-payment of interest, appellant contends: (1) his lease should not have been cancelled for non-payment of interest because he paid the interest within two days of the conclusion of negotiations concerning this issue, and (2) he should not have to pay interest at the rate of 18 percent because BIA failed to send him bills for his 1992 and 1993 rental payments.

Appellant contends that he was entitled under 25 CFR 162.14 to a reasonable opportunity to take corrective actions to cure his breach. He asserts that, after he received the March 30, 1994, letter from the Superintendent, "discussions ensued in which [appellant] put forth his reasons why he did not owe the interest, or if he did why the amount should be reduced" (Appellant's Opening Brief at 5). These discussions, appellant asserts, were negotiations which did not conclude until the Manager sent his June 13, 1994, letter. Therefore, appellant reasons, his payment of the interest on June 16, 1994, was a corrective action taken within a reasonable time.

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fn. 1 (continued)
which ranged from 5% to 7%. He felt it was totally unfair to charge such a high rate of interest under the circumstances."
(Appellant's Opening Brief at 3).

25 CFR. 162.14 provides:

> Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. * * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. [Emphasis added.]

This provision recognizes that a lessee may not always be able to cure a breach instantly and therefore allows a lessee an opportunity to complete a cure over a period of time--provided that, during the 10-day period following receipt of notice, the lessee demonstrates a willingness to cure the breach.

Appellant does not contend, nor does the record show, that he demonstrated any such willingness during the 10 days following March 31, 1994. For that matter, he makes no showing that he informed BIA or the Tribe at any time prior to June 16, 1994, that he was willing to take the necessary corrective measures. As he concedes, even in his June 1994 telephone conversation with the Manager, he was still refusing to acknowledge his liability for interest at the rate specified in his lease.

Contrary to appellant's contention, his communications with BIA and/or the Tribe after March 30, 1994, cannot be deemed "negotiations." Appellant was made aware by the Superintendent's March 30, 1994, letter that BIA had rejected his stated reason for not paying the assessed interest. Yet he continued to put forth that same reason. This was not a negotiation in any sense, but simply a refusal on appellant's part to comply with BIA's demand.

Appellant also contends that 18 percent interest is too high because BIA was at fault for not sending him bills in accordance with its usual practice. Since BIA is partially to blame for his failure to pay rent, appellant contends, he should have to pay only 7 percent interest, "the going rate charged by banks during this time period" (Appellant's Opening Brief at 7).

Nothing in appellant's lease stated that BIA would send him a bill each year or relieved him of his obligation to pay rent if BIA failed to send him a bill. Rather, the obligation was imposed upon appellant as lessee to pay his rent by February 1 of each year. Further, the lease clearly specified the consequence of failing to pay rent on time--liability for interest at 18 percent per year. Appellant should have been well acquainted with this provision, not only from the lease provision itself, but from his experience in 1991, when he was required to pay interest at 18 percent for his failure to pay rent on time.

For purposes of this decision, the Board assumes that appellant is correct in his assertion that, prior to 1992, it had been the practice of BIA to send annual bills to lessees. By appellant's own statement, he became aware in March 1992 that BIA would no longer be sending bills. 2/ Yet, for two years after that, he made no effort to fulfill his obligation to pay rent, attributing his failure to pay to the fact that BIA had not sent him a bill.

[1] Clearly, BIA may be faulted here--not, however, for failing to protect appellant against his own negligence but, rather, for failing to ensure that the Indian lessors received their rental payments in a timely manner. In managing leases of Indian trust property, BIA acts as trustee for the Indian lessors, not the lessee. E.g., Candelaria v. Sacramento Area Director, 27 IBIA 137 (1995). BIA's failure in its duty toward the Indian lessors in this case did not relieve appellant either of his obligation to pay rent or his obligation to pay interest, at the rate specified in his lease, when he failed to make his rental payments on time.

Further, appellant's contention that he should be required to pay interest at the lower rate charged by banks is not only in conflict with the terms of his lease but also premised upon an obvious fallacy--i.e., that in failing to pay his rent for two years, appellant was simply borrowing money from the landowners. Unlike a bank, however, the landowners were not willing lenders. Nor was it a purpose of appellant's lease to provide him with a source of borrowed funds at commercial interest rates. Rather, as stated in the Area Director's decision, "[t]he reason for the 18 percent rate is to encourage lessees to pay their rent in a timely manner" (Area Director's Decision at 6). 3/ Appellant's failure to pay rent deprived the landowners of the use of money to which they were entitled. For this, they were entitled to be compensated at the rate specified in the lease.

Appellant was aware by March 31, 1994, that he was required to pay interest at the rate of 18 percent whether or not he had received invoices from BIA in 1992 and 1993. He was also aware that, if he did not pay the interest within 10 days after March 31, 1994, his lease was subject to cancellation. Despite this knowledge, appellant continued to resist paying the interest. BIA was clearly justified in cancelling appellant's lease on June 15, 1994, when his payment had not been received.

With respect to the June 30, 1994, notice cancelling appellant's lease for failure to post a bond, appellant contends that the lease should not have been cancelled because (1) he commenced efforts to obtain a bond prior

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2/ The BIA employee appellant states he spoke with in March 1992 denies making the statements attributed to her by appellant. The Board finds it unnecessary to address this factual dispute. For purposes of this decision, the Board deems appellant's statement to be an admission that he was aware in March 1992 that BIA would not be sending him a bill.

3/ The Area Director also stated that the 18 percent rate is utilized throughout the Portland Area. Id.

to cancellation of the lease, (2) he did in fact post a bond, albeit after the lease was cancelled, and (3) there has been no injury to the Indian owners.

Appellant states that he did not retain the Superintendent's March 3, 1994, letter and did not remember that the letter included a 10-day notice concerning his bond requirement. He contends that he did not become aware of the problem until he received the Manager's May 2, 1994, letter, whereupon he began efforts to obtain a bond.

Appellant also contends that, because the bond was not mentioned in the Superintendent's March 30, 1994, letter and was not mentioned during ensuing conversations concerning the interest payment, the March 3, 1994, letter was superseded and became ineffective.

Neither of these arguments is persuasive. Appellant does not claim that he did not receive the March 3, 1994, letter. Indeed, his receipt of the letter is evidenced by the explicit term of his own March 9, 1994, letter responding to it. The fact that appellant apparently failed to read the March 3, 1994, letter thoroughly and failed to retain it did not relieve him of his obligation to comply with the bond requirement. Nor was he relieved of that obligation simply because the Superintendent's March 30, 1994, letter did not mention the bond. The March 30, 1994, letter was clearly written in response to appellant's March 9, 1994, letter and his partial payment of the amount assessed against him.

From the record as a whole, it appears likely that appellant's failure to obtain a bond was due to carelessness rather than the deliberate resistance evidenced in his reaction to the interest assessment. If this was the case, however, appellant is still not excused. Indeed, it would be absurd to conclude that a failure to correct a breach is any less a failure because it resulted from careless rather than intentional behavior. Under 25 CFR 162.14, appellant's lease was subject to cancellation 10 days after he received the Superintendent's March 3, 1994, letter. Appellant did not begin efforts to correct his breach until late May 1994. On June 30, 1994, he had still not obtained a bond. BIA had ample reason to cancel appellant's lease on June 30, 1994, for failure to obtain a bond.

Appellant makes two more arguments, which the Board considers briefly. First, he contends that he has been singled out by BIA for harsher treatment than that afforded to other tenants. Appellant contends that BIA has failed to take enforcement actions against some other tenants, whom he declines to identify for fear of causing them problems. He appears to concede, however, that BIA has recently begun to take actions against these other tenants.

Appellant's own case shows some laxity in BIA's enforcement efforts. As evident from the discussion above, BIA failed to take any action against appellant for two years after he ceased paying rent and one year after his bond expired. Even if, as appellant alleges, other tenants got away with more than he did, it does not help appellant's case. In order to prove error in the Area Director's decision in his case, appellant must show that the cancellation of his lease was inconsistent with the terms of the lease

and/or the regulations in 25 CFR Part 162. Cf. Strain v. Portland Area Director, 23 IBIA 114, 118 (1992) (A lessee cannot prove error in a rental adjustment to his own lease by alleging, or even proving, that errors were made in the rental adjustments to other leases).

Finally, appellant contends that, if the Area Director's decision is affirmed, he will suffer a "grievous undue hardship" because he has constructed a home on the property at a cost of $95,000 (Appellant's Opening Brief at 8). He states that, even though he expects BIA to allow him to remove the house, he believes that moving the house may not be possible and, even if possible, very expensive.

In his reply brief, appellant "acknowledges that he probably exercised poor judgment" (Appellant's Reply Brief at 1). He also "acknowledges that he waited too long, both to apply for the bond and to pay the interest" (Id. at 2). He promises that this will not happen again and urges the Board to "reinstate his lease, notwithstanding the breaches of the lease which may have occurred" (Id. at 3).

Appellant is clearly in an awkward position. However, as the Area Director argues, and appellant now appears to realize, his "situation is * * * of his own doing" (Area Director's Brief at 9). Appellant's future relations with the landowners and the Tribe and/or BIA must also be of his own doing, because the Board will not reinstate his lease.

Although it is possible that appellant will be required to vacate the property, the Manager's November 11, 1994, letter 4/ stated that, despite appellant's past behavior, neither the landowners nor the Tribe wished to cause him undue hardship and were therefore willing to renegotiate his lease. Assuming this willingness continues, a new lease appears possible. Appellant will probably find himself in a less favorable negotiating position than he would like, but he has only himself to blame for that.

Appellant has failed to show error in the Area Director's March 20, 1995, decision. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, that decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

4/ This letter was filed with the Area Director in response to appellant's appeal to that official.